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5 **UNITED STATES DISTRICT COURT**
6 **DISTRICT OF NEVADA**

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8 Snow Covered Capital, LLC,

9 Plaintiff,

10 vs.

11 Jodi Fonfa, et al.,

12 Defendants.

Case No. 2:22-cv-01181-CDS-VCF

Order

Motion for Reconsideration (ECF No. 45)

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14 Defendant Jodi Fonfa filed a motion for reconsideration. ECF No. 45. I grant the motion.

15 **I. Background**

16 On October 28, 2022, plaintiff Snow Covered Capital filed a motion to strike defendant Jodi
17 Fonfa's answer to the first amended complaint. ECF No. 40. Since defendant Fonfa did not timely file a
18 response, I granted the motion to strike. ECF No. 44. Defendant's counsel argues in the motion for
19 reconsideration that a calendaring error caused him to inadvertently not file a response to the motion to
20 strike, due in part to the federal holiday. ECF No. 45. Counsel for the defendant argues that the plaintiff
21 will not be prejudiced by allowing him to file his opposition because this case in the beginning stages
22 and discovery only recently started. *Id.* Discovery in this case is due by June 2, 2023. ECF No. 36. The
23 plaintiff argues in its response that it will be prejudiced because allowing the defendant to file an
24 opposition now will unreasonably delay this case. ECF No. 46. The plaintiff also argues that the
25 defendant has acted in bad faith and has strategically delayed this case. *Id.* at 8. Defendant's counsel

1 argues in the reply that he did not act in bad faith or fail to file an opposition to gain an advantage in this
 2 litigation. ECF No. 47 at 5.

3 II. Analysis

4 Excusable neglect is an equitable concept and is "remedial in nature and...must be liberally
 5 applied." *Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253, 1262 (9th Cir. 2010) (citation omitted).
 6 "[A]bsent bad faith on the part of the movant or undue prejudice to the other parties to suit, discretionary
 7 extensions should be liberally granted." *Johnson v. Bay Area Rapid Transit Dist.*, No. C-09-0901 EMC,
 8 2014 U.S. Dist. LEXIS 50541, at 10 (N.D. Cal. Apr. 10, 2014), quoting *Nat'l Equipment Rental, Ltd. v.*
 9 *Whitecraft Unlimited, Inc.*, 75 F.R.D. 507, 510 (E.D.N.Y. 1977).

10 To determine whether a party's failure to meet a deadline constitutes "excusable neglect," courts
 11 must apply a four-factor equitable test, examining: (1) the danger of prejudice to the opposing party; (2)
 12 the length of the delay and its potential impact on the proceedings; (3) the reason for the delay; and (4)
 13 whether the movant acted in good faith. *Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253, 1261 (9th
 14 Cir. 2010), citing to *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395, 113 S.
 15 Ct. 1489, 123 L. Ed. 2d 74 (1993); *Briones v. Riviera Hotel & Casino*, 116 F.3d 379, 381 (9th Cir. 1997)
 16 (adopting this test for consideration of Rule 60(b) motions). No one factor is dispositive. See, e.g., *Doe*
 17 *150 v. Archdiocese of Portland in Oregon*, No. CV 08-691-PK, 2010 U.S. Dist. LEXIS 129877, 2010
 18 WL 5071203, at 1 (D. Or. Dec. 7, 2010). The balancing of all four factors is "left to the discretion of the
 19 district court in every case." *Pincay v. Andrews*, 389 F.3d 853, 860 (9th Cir. 2004) (en banc). The Ninth
 20 Circuit has noted that the fact that a party will have to defend a claim on its merits is not "prejudice" for
 21 purposes of the excusable neglect standard. *Cf. Bateman v. United States Postal Serv.*, 231 F.3d 1220,
 22 1224-25 (9th Cir. 2000) ("The prejudice to the Postal Service was minimal. It would have lost a quick
 23 victory and, should it ultimately have lost the summary judgment motion on the merits, would have to
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1 reschedule the trial date. But such prejudice is insufficient to justify denial of relief under Rule
2 60(b)(1).")

3 In my experience, defense attorneys sometimes attempt to frustrate litigation with unreasonable
4 delays.¹ These types of delay tactics fly in the face of Rule 1 to the Federal Rules, which states that the
5 rules, "should be construed, administered, and employed by the court and the parties to secure the just,
6 speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1 (Note that the
7 2015 amendments clarified that "the parties share the responsibility to employ the rules" to achieve
8 these ends) (emphasis added).

9 Plaintiff appears to contend that defense counsel put his license on the line, by intentionally
10 missing a deadline on a consequential motion—all to delay this case. That tactic would be a high
11 risk/low reward gamble. I am not convinced that defense counsel intentionally missed an important
12 deadline to gain an advantage of a slight delay. There is no danger of prejudice to the opposing party
13 because this case is still in the early stages of discovery. The delay here is not lengthy and is unlikely to
14 have any significant impact on the proceedings. Calendar errors happen to many attorneys at some point
15 in their career. I find that it is reasonable that the delay here was due to a clerical error and not
16 intentional. I find that the movant, in this circumstance, has acted in good faith. On balance, I find that
17 the defendant has met the excusable neglect standard. Given that cases should be decided on the merits,
18 I will vacate my previous order. Should something similar happen again in this case, however, I may
19 consider sanctions, including case dispositive sanctions.
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23 ¹ The plaintiff has an interest in pursuing his case without delay. "A well-known saying, generally
24 attributable to William Gladstone, is that 'Justice delayed is justice denied.' A lesser known saying,
25 known to be attributable to prominent defense lawyers from major law firms, is that 'Justice delayed is
justice [for the defendants].'" *Grewal v. Jammu*, 191 Cal. App. 4th 977, 999, 119 Cal. Rptr. 3d 835, 852
(2011).

1 ACCORDINGLY,


2 I ORDER that defendant Fonfa's motion for reconsideration (ECF No. 45) is GRANTED.

3 Defendant Fonfa has until **Friday, January 20, 2023** to properly file on the docket the opposition to the
4 plaintiff's motion to strike (currently at ECF No. 45-2). The plaintiff's reply will be due seven days after
5 the defendant properly files the opposition on the docket.

6 I FURTHER ORDER that my previous order granting the motion to strike (ECF No. 44) is
7 VACATED.

8 IT IS SO ORDERED.

9 DATED this 17th day of January 2023.

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11 CAM FERENBACH
12 UNITED STATES MAGISTRATE JUDGE
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